

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KEVIN SCHEUNEMANN
Plaintiff,

v.

Case No. 2:09-cv-1134
Chief Judge Charles N. Clevert, Jr.

ASSOCIATED CREDITORS
EXCHANGE, INC., a/k/a ACE
Defendant.

RESPONSE TO PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Defendant Associated Creditors Exchange, Inc. by and through its attorneys Robert S. Phillips and Scott G. Thomas of Thomas & Associates submits its response to plaintiff's partial motion for summary judgment. With respect to said response, this defendant states as follows:

Issues: Plaintiff has filed a motion entitled *Motion of Partial Summary Judgment*. Notwithstanding, it would appear from said motion that plaintiff is seeking summary resolution on the issues of liability as well as damages. Therefore, the issues before the court is whether or not plaintiff has proved liability based upon one or more of the five counts set forth in his complaint and proved his claims for damages in accordance with the substantive law governing the theory for recovery in each count and the procedural law governing the burden of proof he must meet for summary judgment.

Law: This Court should only grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that Mr.

Scheunemann is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Argument:

Defendant's Motion for Judgment on the Pleadings: This defendant has previously filed a motion for judgment on the pleadings which, procedurally, should be ruled upon first inasmuch as it is dispositive. Therefore, defendant adopts and restates its motion for judgment on the pleadings along with all supporting documentation which posits:

- 1) That both Counts I and II of plaintiff's complaint purport to state causes of action based upon violations of the Wisconsin Consumer Act – Debt Collection, Wis. Stats. § 427.101, et seq., and the Fair Debt Collection Practices Act 15 U.S.C. § 1692, et seq., respectively.
- 2) That the debt defendant attempted to collect arose from a commercial loan, not a consumer transaction. Therefore, neither statute applies and these counts should be dismissed. Further, since Counts III, IV and V are derived from Counts I and II, they should be dismissed as well.

Plaintiff's List of Undisputed Facts are Disputed: While defendant would admit or concede to some of the 38 paragraphs or portions thereof in the section entitled *Listing of Undisputed Facts*, it certainly does not admit or concede to the majority of paragraphs as specifically alleged. These are ripe with (1) inaccurate facts, (2) self serving subjective thoughts and representations, and (3) conclusions of law with which this defendant does not agree to and are too numerous to delineate. Further, in as much as

this defendant contests the alleged undisputed facts, this by definition renders plaintiff's motion defective as there are patently obvious genuine issues as to many material facts.

Plaintiff's Supporting Affidavit: The plaintiff's affidavit does not meet the criteria set forth in Rule 56 of the Federal Rules of Civil Procedure inasmuch as it patently contains:

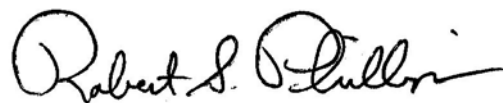
- 1) representations not within affiant's knowledge;
- 2) facts and conclusions of law which would not be admissible in evidence;
and,
- 3) matters which affiant would not be competent to testify to at the time of trial.

Motion Premature: This defendant has yet had the opportunity to conduct any written or oral discovery. To proceed with plaintiff's motion for summary judgment without affording the defendant an opportunity to conduct any discovery would be unfair and prejudicial.

WHEREFORE: Defendant Associated Creditors Exchange, Inc. prays that the court enter an order granting denying the plaintiff's partial motion for summary judgment and to enter such other relief deemed appropriate.

Dated this 25th day of May, 2010.

THOMAS & ASSOCIATES



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PROOF OF SERVICE

I hereby certify that on May 25, 2010, I served
an exact copy of the within document including
all attachments on parties as indicated below by
email and U.S. First Class Mail pursuant to Fed. R. Civ. P. 5.



By _____
THOMAS & ASSOCIATES

TO: Kevin Scheunemann, pro se plaintiff